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In The Supreme Court of the United States

TYREE ALPHONSO ROBERTS A/K/A ABDIYYAH BEN ALKEBULANYAHH,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari to the South Carolina Supreme Court

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a capital defendant waive his right to be present at the sentencing phase of his trial, where his absence during sentencing is the product of his trial strategy and the prosecution advances no countervailing reason for requiring him to be present?

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SUPREME COURT OF THE UNITED STATES

October Term, 2006

No. 06-_____

TYREE ALPHONSO ROBERTS
A/K/A ABDIYYAH BEN ALKEBULANYAHH,

PETITIONER,

versus

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

Counsel for Tyree Alphonso Roberts a/k/a Abdiyyah Ben Alkebulanyahh petitions the Court to issue a writ of certiorari to review the decision of the South Carolina Supreme Court affirming his death sentence.

CITATION TO OPINION BELOW

The South Carolina Supreme Court's opinion is reported as *State v. Tyree Alphonso Roberts a/k/a Abdiyyah Ben Alkebulanyahh*, 369 S.C. 580, 632 S.E.2d 871 (2006), and is printed in the Appendix to this petition at pages A1-A6 .

JURISDICTION

The final judgment of the South Carolina Supreme Court in this case was entered July 24, 2006. The Supreme Court denied rehearing August 11, 2006. (The petition for rehearing and order denying rehearing appear in the Appendix at pages A7-A11.)

The Court has jurisdiction pursuant to 28 U.S.C §1257(a), since Roberts/Alkbulanyahh is asserting the deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor,

> and to have the Assistance of Counsel for his defence.

It also concerns the Fourteenth Amendment, Section I, which provides that no State "shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

For the purpose of this certiorari petition, counsel for Roberts/Alkebulanyahh adopt the statement of facts contained in the South Carolina Supreme Court's opinion in this case. There, the Court states in part:

> This is a capital case. Roberts was convicted of the murder of two Beaufort County Sheriff's Deputies and was sentenced to death. ... At the guilt or innocence phase of trial, he chose to represent himself.

632 S.E.2d at 872.

How the federal issue was raised below

Even before the jury concluded its deliberations in the guilt phase, Roberts/Alkebulanyahh informed the judge that he desired to waive his right to be present during the sentencing phase. ROA p. 3448, lines 20–23. The judge immediately responded, "I'm not going to get into a debate about that, because my intention is for you to be here." ROA p. 3448, lines 23–25. Roberts/Alkebulanyahh did not wish to participate. He explained, "I don't see where it would be

helpful to me in any type of manner... I don't see where it would, you know, do anything for me to no extent." ROA p. 3450, lines 2–6. He would not be testifying. ROA p. 3453, lines 9–14. He would not be presenting any evidence in mitigation. ROA p. 3449, lines 1–5; ROA p. 3453, lines 17–20.

The judge believed that Roberts/Alkebulanyahh was required by law to be present. ROA p. 3461, lines 10–17. If so, Roberts/Alkebulanyahh indicated that he would become "unruly" and would probably have to be "restrained physically." ROA p. 3461, line 18 – p. 3462, line 10. He planned on being vocal, but not violent. ROA p. 3483, lines 3–10. "A capital case requires the defendant's presence," the judge intoned. ROA p. 3483, line 20. He would force Roberts/Alkebulanyahh to attend if necessary. ROA p. 3484, lines 1–5.

"I have presented all that I want to present," Roberts/Alkebulanyahh explained. ROA p. 3487, lines 5–8. He only wanted to be present for the actual sentencing itself. ROA p. 3492, lines 17 and 18. Essentially, Roberts/Alkebulanyahh wished to be absent during the presentation of the State's case in aggravation. ROA p. 3494, lines 16–19. He had no desire to confront the State's witnesses. ROA p. 3517, lines 2–21. Roberts/Alkebulanyahh added:

> I don't want to look. I don't want to hear. I don't want to hear anything... I don't want to see anything. I have no concern about [sentencing]. I waive any defense in reference to that proceeding. And I would like to waive my right to not even be there if I have that right... I don't want to be at the proceeding. I don't want to see any of the proceedings. I

> definitely don't want to hear the proceedings. " And I have no interest in the proceeding. I'm only interested in the sentence.

ROA p. 3518, lines 4–21. The judge remained unmoved. "Until we hear what the sentence is, you have to be there," he replied. ROA p. 3519, lines 10–13.

With Roberts/Alkebulanyahh thus involuntarily present in the courtroom, the State called its first witness. Roberts/Alkebulanyahh immediately began chanting, "Blessed be Yahweh, El Shaddai, Jehovah, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob and Jesus. " ROA p. 3550, line 17 – p. 3551, line 4. He was then removed from the courtroom in the presence of the jury. Roberts/Alkebulanyahh told the judge that he intended to continue with this behavior because "I do not wish to engage in the proceedings." ROA p. 3551, line 20 – p. 3552, line 5. The judge cautioned:

> If you do it again, I'm not going to remove you from the courtroom. I'm going to put you in the back room where you can hear the testimony and the proceedings as you wish. The glass panel will allow you to watch the proceedings completely. If you wish to turn your back on the proceedings, you have that right.

ROA p. 3552, lines 10–18. He would also have Roberts/Alkebulanyahh shackled and gagged if necessary. ROA p. 3552, line 20 – p. 3553, line 11.

Roberts/Alkebulanyahh again began chanting or praying when the first witness was recalled to the stand. ROA p. 3556, lines 3–5. The judge removed him to a holding cell at

the back of the courtroom that had a glass partition through which he could see the proceedings. ROA p. 3556, lines 18–23. Conversely, the jury could also observe Roberts/Alkebulanyahh. ROA p. 3565, line 21 – p. 3566, line 3; ROA p. 3598, lines 4–6. Roberts/Alkebulanyahh continued to object. ROA p. 3557, lines 19–23. He pleaded with the judge "to exempt me from these proceedings." ROA p. 3558, lines 20 and 21. The judge again denied his request "because it's not within my capability of doing that." ROA p. 3558, line 22 – p. 3559, line 3. Before he was sent to the holding cell, Roberts/Alkebulanyahh stated:

> I believe that I should have the right to waive this proceeding... because these proceedings (sic) has no direct advantage for the defense at all... [T]here is no way that I could contribute nor take away from the proceeding.

ROA p. 3560, lines 2–11.

Roberts/Alkebulanyahh rejected the judge's subsequent offers to allow him back into the courtroom. Each time, he was returned to the holding cell. ROA p. 3596, lines 6–13; ROA p. 3681, lines 3–5; ROA p. 3738, lines 2–9; ROA p. 3765, lines 2–18; ROA p. 3795, lines 15–19. He finally returned to the courtroom to make a closing statement, listen to jury instructions and receive his death sentence. ROA p. 3828, lines 10–13; ROA p. 3840, lines 6–10.

The judge relied solely on South Carolina Criminal Procedure Rule 16 for his ruling. ROA p. 3532, lines 6–16. That Rule states:

> Except in cases wherein capital punishment is a permissible

> sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon a failure to attend the court.

Rule 16 was adopted to effectuate a criminal defendant's constitutional right to be present at trial. *State v. Williams*, 292 S.C. 231, 355 S.E.2d 861 (1987).

How the federal issue was decided on direct appeal

On direct appeal to the South Carolina Supreme Court, counsel for Roberts/Alkebulanyahh argued:

> The judge erred by refusing to allow appellant to waive his right to be present at the sentencing phase, instead confining him to a holding cell attached to the courtroom in which he was visible to the jury, particularly since appellant's absence during sentencing was his pro se trial strategy and the State advanced no countervailing reason for requiring him to be present.

The Court affirmed the death sentence on the following grounds, quoted verbatim from the Court's opinion:

1. Although it may, under certain circumstances, be *permissible* [emphasis in original] to allow a capital defendant to be absent from trial, this does not mean there is a constitutional right to be absent. On the contrary ... there is no constitutional right of a defendant not to be present at trial. [Citation and footnote omitted.] Accordingly, no constitutional right of Roberts was violated by his continued presence at trial. [Footnote omitted.]

2. Moreover, Roberts has demonstrated no prejudice from his continued attendance at trial; there is simply no basis to conclude that his death sentence resulted from his presence in a holding cell at the back of the courtroom. [Citation omitted.]

632 S.E.2d at 673-4. Counsel filed a petition for rehearing on these two points. The Court denied rehearing.

WHY THE WRIT SHOULD BE GRANTED

A capital defendant may waive his right to be present at the sentencing phase of his trial, where his absence during sentencing is the product of his trial strategy and the prosecution advances no countervailing reason for requiring him to be present.

The argument that a capital defendant cannot waive his right to be present at trial essentially comes from three United States Supreme Court cases: *Diaz v. United States*, 223 U.S. 442 (1912), *Lewis v. United States*, 146 U.S. 370 (1892), and *Hopt v. Utah*, 110 U.S. 574 (1884). However, the Court has never directly ruled on the issue of whether a defendant can waive his right to presence in a capital case. *L'Abbe v. DiPaolo*, 311 F.3d 93 (1st Cir. 2002). "[T]he issue of whether a defendant must be present at all times in a capital trial has not yet been settled by the Supreme Court." *Moore v. Campbell*, 344 F.3d 1313, 1323 (11th Cir. 2003).

Roberts/Alkebulanyahh is not asserting the existence of some inchoate "right to be absent." Roberts exercised his Sixth and Fourteenth Amendment right to act as his own counsel. See *Faretta v. California*, 422 U.S. 806 (1975). He had a concomitant right to present a defense. See, for example, *Pointer v. Texas*, 380 U.S. 400 (1965). Taken together, these constitutional guarantees afford an accused the personal right to craft the course of his defense. Acting as his own counsel, as a matter of trial strategy, Roberts elected to be absent from the courtroom during the State's case at sentencing.

The State's evidence in aggravation consisted almost entirely of emotionally-wrenching victim impact testimony. Thus far, the South Carolina Supreme Court has chosen to place no limits whatsoever on either the quantity or quality of victim impact evidence the State may introduce at sentencing, so that the State's case in aggravation now resembles nothing

so much as a memorial service for the victim.

How does a capital defendant (or, for that matter, defense counsel) respond to such testimony? By downplaying or ignoring it, usually: cross-examination of victim impact witnesses is virtually nonexistent. News reports routinely describe the capital defendant as appearing "emotionless" during the presentation of victim impact testimony.

Roberts'/Alkebulanyahh's decision to be absent from the courtroom during sentencing was a legitimate, strategic exercise of his Sixth and Fourteenth Amendment right of self-representation and right to present a defense. The South Carolina Supreme Court's opinion, if left uncorrected, would allow trial judges to recognize or deny these fundamental constitutional rights at will, as it offers absolutely no guidance on this point. (Strangely enough, it seems the Court would allow a disruptive defendant to be absent without hesitation, but not one who, like Roberts/Alkebulanyahh, attempts to comply with the rules by making a formal motion.)

Next, given the nature of capital sentencing in South Carolina, the harmless error standard adopted by the South Carolina Supreme Court in this case was virtually impossible to satisfy. The Court writes that "there is simply no basis to conclude that [Roberts'] death sentence resulted from his presence in a holding cell at the back of the courtroom." Why not? In *State v. McClure*, 342 S.C. 403, 537 S.E.2d 273, 275 (2000), the Court noted that "the evaluation of the consequences of an error in the sentencing phase of a capital case are more difficult because of the discretion that is given to the sentencing jury [in South Carolina]. A capital jury can recommend a life sentence for any reason or no reason at all."

Finally, the Court's opinion stands harmless error on its head by requiring the defendant to prove that a constitutional error was harmful. Since the defense in South Carolina (as well as the prosecution and, ultimately, this Court) never learns precisely why a capital jury sentenced a defendant to death, the burden imposed by the Court could never be satisfied. The proper harmless error standard is

instead to be found in *Chapman v. California*, 386 U.S. 18, 24 (1987): "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it is harmless beyond a reasonable doubt." That cannot be said in the present case, where Roberts was not only present against his will, but caged, as if he were an immediate threat to the remaining participants in his trial.

For the trial judge also compounded the error by confining Roberts/Alkebulanyahh to a holding cell in which he was visible to the jury. As the Supreme Court explained in *Illinois v. Allen*, 397 U.S. 337, 344 (1970):

> Trying a defendant for a crime while he sits bound and gagged before the judge and jury would to an extent comply with that part of the Sixth Amendment's purposes that accords the defendant an opportunity to confront the witnesses at the trial. But even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried by shackled and gagged except as a last resort. Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.

When the judge imprisoned Roberts/Alkebulanyahh within the

courtroom, he achieved the same effect in the jury's eyes as if he had ordered Roberts/Alkebulanyahh bound and gagged. The only inference a reasonable juror could have drawn was that Roberts/Alkebulanyahh had become a threat to those in the courtroom – including the jurors themselves.

In conclusion, Roberts/Alkebulanyahh voluntarily waived his right to be present at sentencing as a pro se trial strategy. The State advanced no reason to deny his request. The trial judge erred by denying the motion and then compounded the error by confining Roberts/Alkebulanyahh to a holding cell in view of the jury.

CONCLUSION

The Court should issue a writ of certiorari to review and reverse the death sentence of Tyree Alphonso Roberts a/k/a Abdiyyah Ben Alkebulanyahh.

Respectfully submitted,

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No. _____

In The
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TYREE ALPHONSO ROBERTS
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STATE OF SOUTH CAROLINA,
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On Petition for Writ of Certiorari to the South Carolina Supreme Court

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APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,
v.
Tyree Alphonso Roberts, a/k/a Abdiyyah Ben Alkebulanyahh, Appellant.

Appeal From Beaufort County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 26185
Heard May 24, 2006 – Filed July 24, 2006

AFFIRMED

Chief Attorney Joseph L. Savitz, III, and Assistant Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General

Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, all of Columbia, and Solicitor Isaac McDuffie Stone, III, of Beaufort, for Respondent.

JUSTICE WALLER: This is a capital case. Roberts was convicted of the murder of two Beaufort County Sheriff's Deputies and was sentenced to death. The sole issue he raises on appeal is whether the trial court erred in requiring him to remain present during the sentencing phase of his trial. We affirm the convictions and sentence.

FACTS

In January 2002, Roberts lived in a trailer owned by Brenda Smith on Riley Road in Beaufort County. Also residing at the trailer were Smith's husband, Isaac, and Roberts' wife Nzuri. At the time of the crime in this case, a girl named Kimberly Blake, with whom Roberts had an infant daughter, was also staying there. On January 8, 2002, Kimberly Blake asked her friend, Strawberry Washington, to call police to come to the house to assist her in leaving because Roberts had hit her. Beaufort County Sheriff's Deputies Dyke Coursen and Dana Tate responded. According to Kimberly Blake, when police arrived, Roberts hid in the bedroom closet with his rifle. He gave Kimberly the okay to go out of the bedroom. She left the bedroom and Brenda Smith gave the officers permission to search the bedroom. Officers Coursen and Tate went into the bedroom. Smith and Blake heard gunshots. Blake ran outside and down the road. She was joined shortly after by Roberts coming through the woods with a gun in his hands. Roberts stated, "I just killed those two white bitches and I'm going to

say it was self-defense." Blake left Roberts and returned to the scene to talk to police.

When backup officers responded to the scene, they found officers Coursen and Tate dead; Coursen had suffered six gunshot wounds, Tate had seven. Roberts was subsequently found hiding in the mud under a bridge with a shoulder and hip wound. Roberts was arrested. At the time, he had a black fanny pack carrying ammunition for an M-14 assault rifle, a cell phone and a knife. Police subsequently found a rifle magazine and an SKS assault rifle in the area in which Roberts had fled. The bullets and casings recovered from the victims and the scene of the crime were conclusively matched to the assault rifle.

Roberts was charged with capital murder. At the guilt or innocence phase of trial, he chose to represent himself. However, two attorneys remained as stand-by counsel to assist him at trial. While the jury was deliberating, Roberts indicated to the trial court that if the jury returned a guilty verdict, he did not intend to participate at sentencing. He also indicated he did not want his stand-by attorneys to present a defense. Roberts indicated that if the trial court required him to be present at the sentencing hearing, he would be unruly and would have to be restrained.

The jury convicted Roberts of two counts of murder. Roberts advised the court he did not intend to offer any mitigating evidence and expressed his desire to absent himself from the sentencing; he indicated he would probably be unruly if required to be present. Stand-by counsel conferred with Roberts and then advised the court as follows:

> He says that he doesn't agree to any changes in his status as attorney of record, and that if the court makes any change,

> they'll have to do it on their own motion. . . and that if the judge - if the attorneys on stand-by are to perform in any capacity, the judge will have to order that on his own motion. . . He says that he doesn't want to be present in this courtroom in order to hear the evidence in the second phase. And that if the judge - but he does not intend to disrupt the proceedings. . . but if the judge determines that he should be in one of the side rooms . . . that's a decision that his honor will have to make himself. He says that he is withdrawing from any further discussion with the court. . . . he does not intend to cooperate with stand-by counsel, to bring any witnesses. . . .

The trial court was concerned with Roberts' decision, but was also disturbed that to appoint counsel to represent Roberts at sentencing might compromise his right to proceed pro se. Roberts continued to maintain that he did not intend to confront any witnesses, and did not want to see the witnesses. He persisted in advising the court that if forced to remain present, he would be disruptive. As neither party could point to specific case law governing the circumstances, the court determined the best course of action was to proceed with Roberts present in the courtroom, with the condition that if he became disruptive, the trial judge would take such action as necessary. Roberts indicated his desire that counsel

not represent him in any way, but ultimately decided counsel could
remain as stand-by counsel to object to the introduction of improper evidence. The sentencing proceeded with Roberts seated at counsel table. As soon as the first witness was sworn, Roberts stood and began to chant aloud, "Blessed be Yahweh, El Shaddai, Jehova, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob, and Jesus." He was told by the court to be seated, and when he continued chanting, he was removed and a brief hearing was held in the hearing room at the back of the courtroom. Roberts was brought back into the courtroom and once again began chanting when the witness began to testify. The jury was removed, and Roberts was placed in a conference room at the back of the courtroom which had a glass partition to allow him to hear and see into the courtroom. He was initially restrained, but the restraints were removed before the jury was
returned to the courtroom.

Throughout sentencing, the court offered to allow Roberts to come back into the courtroom if he could do so without being disruptive; however, Roberts indicated he would rather remain in the back room. Roberts ultimately returned to the courtroom to make a closing statement to the jury. After deliberations, the jury found the existence of the two aggravating circumstances and recommended a sentence of death. Roberts appeals.

ISSUE

Did the trial court commit reversible error in refusing Roberts' request to be completely absent from sentencing?

DISCUSSION

It is well-established that an accused may waive the right to counsel and proceed pro se. State v. Reed, 332 S.C.

35, 503 S.E.2d 747 (1998), citing Faretta v. California, 422 U.S. 806 (1975). Although a defendant's decision to proceed pro se may be to his own detriment, it "must be honored out of that respect for the individual which is the lifeblood of the law." Id. *Citing* State v. Bell, 293 S.C. 391, 360 S.E.2d 706, 711 (1987), Roberts asserts a defendant need not be present at all times during a capital trial. We find Bell inapplicable to the facts of this case. There, the defendant twice disrupted the guilt-phase closing argument of his defense counsel, objecting to the trial proceeding on the Sabbath. After being warned against such conduct, Bell again disrupted the proceedings, and was removed to a holding cell without the benefit of any audio hookup. This Court held that the right to be present at trial could be waived, and that Bell's disruptive conduct amounted to a waiver of the right to be present at trial, such that he could not be heard to complain.

Although it may, under certain circumstances, be permissible to allow a capital defendant to be absent from trial, this does not mean there is a constitutional right to be absent. On the contrary, this Court has specifically held there is no constitutional right of a defendant not to be present at trial. State v. Moore, 308 S.C. 349. 417 S.E.2d 869 (1992). [1] Accordingly, no constitutional right of Roberts was violated by his continued presence at trial. [2] Moreover, Roberts has demonstrated no prejudice from his continued attendance at trial; there is simply no basis to conclude that his death sentence resulted from his presence in a holding cell at the back of the courtroom. Accord State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998), cert. denied, 525 U.S. 1077, 119 S.Ct. 816, 142 L.Ed.2d 675 (1999) (death penalty defendant failed to show prejudice from presence in jury room of religious pamphlet concerning God's view of death penalty, where misconduct did not affect jury's verdict).

CONCLUSION

Roberts' convictions and sentence are affirmed. We have conducted the mandatory review required by S.C. Code Ann. § 16-3-25 (1985). The evidence indicates the sentence was not the result of passion, prejudice, or any other arbitrary factor, the evidence supports the finding of the aggravating circumstances, and the sentence is not disproportionate to that imposed in similar cases. State v. Sapp, 366 S.C. 283, 621 S.E.2d 883 (2005), cert. denied, ___ U.S.___ 2006 WL
565552 (May 15, 2006); State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999), cert. denied, 529 U.S. 1025 (2000); State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991), cert. denied, 503 U.S. 993 (1992); State v. South, 285 S.C. 529, 331S.E.2d 775, cert. denied 474 U.S. 888 (1985).

AFFIRMED.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

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[1] The defendant in Moore asserted he had a right not to be present at trial in order to preclude an in-court identification of him by the State's witnesses. However, our holding in Moore unequivocally held there is no constitutional right not to be present at trial. Moore applies not only where the defendant wishes to prevent an identification, but applies with equal force in any case in which the defendant desires to absent himself from trial.

[2] Moreover, Rule 16, SCRCrimP, states that, "except in cases wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence. . . " In a similar situation, the California Supreme Court recentlyheld a "capital defendant may not voluntarily waive his right to be present during . . . those portions of the trial in which evidence is taken, and . . . may not be removed from the courtroom unless he has been disruptive or threatens to be disruptive." People v. Huggins, 41 Cal. Rptr. 3d 593 (2006). Similarly, the Alabama

Court of Criminal Appeals has recognized that until 1997 (when Alabama Rules Crim. Proc., Rule 9.1(a), (b)(2) was amended), a defendant charged with a capital offense could not waive his right to be present at any phase of the capital trial. Robitaille v. State, ___So.2d ___, 2005 WL 3118795 (Ala. Crim. App. 2005).

August 11, 2006

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South Carolina Commission on Indigent Defense
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Re: State v. Roberts, aka Alkebulanyahh

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ Jean H. Toal	C.J.
s/ James E. Moore	J.
s/ John H. Waller, Jr.	J.
s/ E.C. Burnett, III	J.
s/ Costa M. Pleicones	J.

August 11, 2006."

The remittitur is today being forwarded to the lower court.

Very truly yours,
s/
Daniel E. Shearouse, Clerk

DES/dmh
cc: Assistant Attorney General S. Creighton Waters
The Honorable Isaac McDuffie Stone, III

No. 06-920

In the
Supreme Court of the United States

TYREE ALPHONSO ROBERTS A/K/A
ABDIYYAH BEN ALKEBULANYAHH, *PETITIONER*,

v.

SOUTH CAROLINA, *RESPONDENT*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

There was no reversible error from the trial court's refusal to allow petitioner to completely absent himself from sentencing, where: (1) he has no enforceable right *not* to br present, (2) the simple and basic requirement of presence in a capital case is not the sort of rule that can violate one's right to present a defense, and (3) any error was harmless.

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CITATION TO OPINION BELOW

The decision of the Supreme Court of South Carolina affirming Petitioner's convictions and sentences is reported as *State v. Roberts*, 632 S.E.2d 871 (S.C. 2006). This decision is reprinted in the Appendix to Petitioner's brief.

JURISDICTION

The decision of the Supreme Court of South Carolina was entered on July 24th, 2006. This Court's jurisdiction is apparently invoked pursuant to Petitioner28 U.S.C. § 1257, with Petitioner asserting a deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves:

1. The Sixth Amendment to the United States Constitution, which provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

2. The Fourteenth Amendment to the United States Constitution, which forbids, in pertinent part, the deprivation of "life, liberty, or property, without due process of law."

3. Rule 16 of the South Carolina Rules of Criminal Procedure, which provides: "Except in cases wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon a failure to attend the court."

RESPONDENT'S STATEMENT OF THE CASE

A. Procedural History

In March 2002, the Beaufort County Grand Jury indicted Appellant, Tyree Alphonso Roberts a/k/a Abdiyyah Ben Alkebulanyahh, for two charges of murder for the shooting deaths of two Beaufort County Sheriff's Deputies (02-GS-07-0369 & 0370). **{R. 4534-35}**. The state gave notice of intent to seek the death penalty, and served its notice of evidence in aggravation.

Appellant represented himself at his jury trial, but Attorneys Gerald Kelly and Sean Thornton remained throughout the trial to assist. *Voir dire* in the case began before the Honorable Daniel F. Pieper on October 6th, 2003. Trial began on October 10th, 2003. **{R. 1316}**. On October 21st, 2003, Appellant's jury convicted him of both charges. **{R. 3472-73}**.

The sentencing phase of his trial began on October 22nd, 2003. Judge Pieper submitted the following aggravating factors to the jury:

> (1) The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former

> fireman during or because of the performance of his official duties.
>
> (2) Two or more persons were murdered by the defendant by one act or pursuant to on scheme or course of conduct.

{R. 3847; 4529}. The following mitigating factors were submitted to the jury:

> Whether the existence of any non-statutory mitigating circumstance was supported by the evidence.

{R. 3851; R. 4529}.

On October 22nd, 2003, Appellant's jury found the existence of the aggravating factors and recommended a sentence of death on the murder counts. That same day, Judge Pieper sentenced Appellant to death. **{R. 3861-68; 3873; 4533}**.

A timely Notice of Appeal was filed with the South Carolina Supreme Court. Petitioner was represented on direct appeal by Joseph L. Savitz, III, and Robert M. Dudek, of the South Carolina Office of Appellate Defense. On March 7th, 2006, Petitioner submitted a Final Brief of Appellant to the state supreme court, in which he raised the following issue:

> The judge erred by refusing to allow appellant to waive his right to be present at the sentencing phase, instead confining him to a holding cell attached to the courtroom in which he was visible to the jury, particularly since appellant's absence during sentencing was his pro se trial strategy and

> the State advanced no countervailing reason for requiring him to be present.

The State, represented by Assistant Attorney General S. Creighton Waters, filed a Final Brief of Respondent on February 17, 2006. Oral argument was held before the South Carolina Supreme Court on May 24th, 2006. The South Carolina Supreme Court issued an opinion dated July 24th, 2006, affirming the sentence.

Following a Petition for Stay of Execution by Petitioner and a Return by the State, the South Carolina Supreme Court issued an Order dated September 7th, 2006, in which it stayed the execution so that Petitioner could file the instant petition for writ of certiorari.

B. Statement of the Guilt Phase Evidence Presented at Trial

In this case, Petitioner was convicted and sentenced to death for murdering two police officers who responded to a domestic call at his home. Petitioner testified that two others were in the room when the shooting happened, and that he did not shoot anyone. He did not present a case in mitigation.

i. Kimberly calls her friend for help

In January 2002, Petitioner was living with his wife Nzuri at the home of Brenda Smith on Riley Road in Beaufort County. Apparently, Petitioner had also fathered a young infant with 20-year old Kimberly Blake. **{R. 1682-83; 1809-10}**.

Kimberly apparently placed a whispered phone call to her friend Strawberry Washington at about 2:30 p.m. on January 8th, 2002. Kimberly asked Strawberry to call the police because she

was scared to leave Petitioner's residence. **{R. 1648-52; 1654-59; 1679-80; 1685-86; 1701-03; 1716-19; 1770-71}**. Strawberry called police and then drove to the Riley Road home, where she met Deputies Tate and Coursen. **{R. 1649-52; 1657-59}**.

Brenda Smith answered the door and invited the officers inside. Brenda then knocked on Petitioner's bedroom door and asked Kimberly to come out. **{R. 1650-52; 1688; 1811-13; 1814-15; 1690}**. Kimberly testified that Petitioner said he was not going back to jail, got his rifle, and went into the closet. **{R. 1686-90; 1784-85}**. Once Kimberly came outside of the bedroom, the officers asked to search it. Brenda and Kimberly agreed. **{R. 1690-91; 1812-15; 1833}**.

At that point, Strawberry, Brenda, and Kimberly heard gunshots from the bedroom. Strawberry drove off to a nearby house and reported the gunshots to 911; Kimberly ran. Brenda stayed behind with the baby. **{R. 1691-92; 1651-52; 1813}**.

ii. Kimberly and Petitioner run away

Kimberly ran to her cousin's house. Petitioner then came running through the woods still holding the rifle. Petitioner proclaimed to Kimberly that he had just shot those "white bitches" and he was going to say it was self-defense. **{R. 1691-94; 1700-01; 1783; 2219}**. The two then ran into a marsh. Eventually, Kimberly told Petitioner she could not go on. Kimberly returned to the scene. **{R. 1537-45; 1694-1701; 1840-42; 1850-55; 2072}**.

A marine reported Petitioner crawling through the marsh, and officers found Petitioner hiding underneath a bridge. In a fanny pack on Petitioner's waist were black leather gloves, eight rounds of Wolf Hollow Point 7.62mm ammunition, 31 rounds of 9mm ammunition, a cell phone, and a 4 inch knife. **{R. 1920-26;**

1940-43; 1954-55; 2015; 2019-20; 2026-30; 2032-33; 2035; 2169; 2403-04}. Officers found a loaded rifle magazine in the marsh. A K-9 unit found Petitioner's SKS assault rifle hidden under a pile of leaves. **{R. 2072-81; 2095-97; 2099-2101; 2103-2109; 2112-15; 2311; 2315; 2317; 2321; 2395}**.

iii. The forensic evidence

Deputy Coursen was discovered in Petitioner's bedroom, dead from six gunshot wounds. His pistol was secured in its holster. **{R. 1435-37; 1494-1506; 2252-53; 2304-07; 2394-95}**. Deputy Tate was found with his service weapon underneath him. He had seven gunshot wounds, but managed to get off ten shots. **{R. 1437-1440; 1506-1515; 2252-53; 2308-10; 2392-93}**.

Police officers recovered twenty 7.62mm casings and ten .40 caliber casings. **{R. 2253-86}**. The door to the closet in the corner of the bedroom had .40 caliber holes going from the outside into the closet, and 7.62mm holes going from the inside of the closet out into the bedroom. **{R. 2253; 2287-94; 2421; 2429-31}**. A box of Wolf 7.62mm ammunition was found. **{R. 2296-97}**. Seventeen bullet fragments and projectiles were found in the bedroom, bathroom, and living area of the trailer. **{R. 2301-2304; 2403-04}**.

Petitioner's SKS was matched to the bullet recovered from Deputy Coursen, and a fragment from Deputy Tate. **{R. 2401-02}**. Nineteen 7.62mm casings from the scene could be matched to Petitioner's SKS. **{R. 2405-06}**. All ten .40 casings came from Deputy Tate's gun. **{R. 2406-07}**. Some of the bullet fragments could be matched to Petitioner's SKS. **{R. 2407-10}**.

Petitioner's fingerprints were found on the magazine recovered from the marsh. **{R. 2321-22}**. His DNA was matched to blood samples taken from the bedroom, Kimberly's bra, a stick

found near where the rifle was hidden, and the rifle itself. **{R. 2312-16; 2483-84; 2491}**.

iv. Petitioner's incriminating statements

During booking, Petitioner told officers that he had just killed two cops and he did not have to comply with their requests as he was looking at the chair anyway. **{R. 2551-57; 2562; 2569-71}**. On September 6th, 2002, while at the Beaufort County Detention Center, Petitioner told officers, "I already took two people out and you guys are next". **{R. 2574-2582; 2589-91}**.

v. The defense guilt phase case

Petitioner called a large number of witnesses, many of whom had nothing of significance to offer. Deputy Campbell testified about giving Kimberly's baby to DSS, and was asked whether she conspired to take Kimberly's baby to force Kimberly to claim Petitioner had the gun. **{R. 2871-87; 2925-33}**. Some deputies testified about some of Kimberly's allegedly inconsistent statements. **{R. 2850-53; 2996-3014; 3158-60}**. Petitioner called some witnesses who testified about police investigation of other people for possible involvement in the crime. **{R. 2720-30; 2750-59; 2956-67; 2969-87; 3015-22; 3157-58; 3161-63; 3175-77}**.

Finally, Petitioner testified. Petitioner said when he returned to the Riley Road residence, Kimberly supposedly told Petitioner that Bobby Rigby and her cousin Michael Blake had been at the residence earlier but would be right back. Petitioner was using the restroom when he heard a knock at the door. He screamed for Kimberly to answer it, but the knocks persisted. Petitioner claimed he next saw the officer standing in front of him pointing a gun at his face, asking his name. The officer told Petitioner he "looked like a Taliban", and ordered Petitioner off the toilet. **{R. 3190-93}**.

Petitioner said he complied with the officer's instructions, and saw Rigby and Blake in the bedroom. Deputy Tate ordered Coursen to pat Petitioner down. **{R. 3193-94}**. Petitioner claimed that when a stack of cassette tapes in the room fell over and made a noise, Deputy Tate fired, which hit Deputy Coursen. Petitioner turned before being shot in the shoulder. Petitioner said he ran out of the house, hearing more gunshots as he escaped. **{R. 3194-96}**.

Petitioner realized he had been shot in the hip. Kimberly helped support him as they went to her cousin's house. Supposedly, Michael Blake ran up and helped until Michael said they had to leave Petitioner behind. **{R. 3196-99}**. Petitioner finally collapsed on an embankment. **{R. 3199-3203}**.

vi. The sentencing phase

The State called witnesses to testify as to Petitioner's extensive prior record. He kidnapped a man at gunpoint in 1981. **{R. 3566-82}**. While serving about three years in jail for that crime in Florida, he committed thirteen disciplinary infractions, which included assault and fighting. **{R. 3583-88}**.

In 1986, Petitioner robbed a Georgia fast food store at gunpoint. **{R. 3590-3606}**. During his stay in Georgia prison, he committed 66 disciplinary infractions and had to be repeatedly moved from one institution to the next because he was a troublemaker. In one incident, Petitioner refused to comply with the orders of correctional officers and threatened to kill them as he resisted. Another time he was involved in a plot to initiate a disturbance in the prison. **{R. 3607-21}**.

In 1997, Petitioner pled guilty to selling marijuana on the street. During his stay in South Carolina prisons, he committed

five disciplinary infractions, including threatening to harm a correctional officer. **{R. 3626-44}**.

In 2001, Petitioner beat up an eleven year old girl who was throwing rocks at a dog. Pictures of the wounds to the girl's legs were introduced into evidence. **{R. 3648-57}**.

During his three months in Charleston pre-trial detention, Petitioner committed two infractions for destroying jail property. **{R. 3658-62}**. During his pre-trial stay in Beaufort County jail, he on three occasions threatened to kill or hurt a female guard while using other abusive language and refusing to calm down. **{R. 3662-67}**. During his stay, he committed nine infractions, most of which involved refusal to obey orders, disorderly conduct, or threatening an officer. **{R. 3671-74}**.

Photos were introduced of the two officers at the horrific crime scene. **{R. 3678-86}**. The State concluded with a number of victim impact witnesses. **{R. 3687-3759}**.

Petitioner repeatedly declined to present any mitigation case whatsoever, stating that after the jury found him guilty, he wanted no further involvement in the proceeding. **{R. 3448-54; 3460-61; 3481-87; 3761-62}**.

C. Presentation of the federal issue at trial

As noted before, Petitioner represented himself in pre-trial proceedings, jury selection, and the guilt phase. Only after closing argument was completed in the guilt phase, and while the jury was still in the deliberation, did the problems begin. The court noted that while it had honored Petitioner's desire to represent himself, and even appointed stand-by counsel to help Petitioner, Petitioner apparently had said he did not intend to participate in sentencing. Petitioner agreed. **{R. 3448-3450}**.

Petitioner stated he wanted to continue to represent himself, but that he would not be attending the sentencing. When the judge said that he would need to be present, Petitioner replied he "wouldn't be able to sit there and attend that proceeding", and then proclaimed that he "waive[d] all the rights to any objections to anything in the event that I'm found guilty". **{R. 3450-54}**.

Petitioner stated that he did not want to participate in sentencing because:

> [I] wouldn't have no bearing on me, because if I'm in prison for life, that's death to me. I can never accept that. You know, I don't find [a life sentence] as a easy or something positive or good in my situation. Death would be more preferable than life.

Petitioner also told the court this was a decision he had thought long and hard about. **{R. 3454-58}**.

After the meeting, the court found Petitioner's decision to be voluntarily and knowingly made with regard to his sentencing phase rights. When the judge said Petitioner was going to remain present, though, Petitioner said he would probably be "unruly" and would have to be restrained. The court stated that Petitioner would be restrained if need be. The court pointed out that "you asked to represent yourself, and you'll need to follow that through". **{R. 3460-63}**.

Petitioner continued to make guilt phase motions and otherwise represent himself even after a verdict the next morning. **{R. 3463-82}**. However, as the parties discussed logistics, Petitioner stated that he had no intention of sitting in the courtroom listening to the case, and he would be unruly. The court responded that it had honored Petitioner's request to

represent himself, that a capital case required the defendant's presence, and that the only other times a capital defendant had been removed there was still a lawyer there. **{R. 3482-83}**.

Petitioner explained that the sentencing phase made no difference to him whichever way it went. According to Petitioner, he did not care for the jury to know anything about him, because he had already presented everything he wanted to present in the guilt phase. Petitioner declined the court's suggestion that he sit in the back room where he could observe the proceedings. **{R. 3484-88}**.

As the conversation continued, Petitioner said that from the beginning he had instructed his stand-by attorneys and investigators that there would be no mitigation witnesses called. Petitioner specifically requested for the record that he be excluded from everything but the actual sentencing itself. **{R. 3490-92}**.

After lunch, the court again took up the issue, phrasing it as attempting to balance Petitioner's right to represent himself with his right not to present evidence or testify. Petitioner then spoke up and again said he would be a disruption. The court told Petitioner it would deal with that if it arose. **{R. 3512-14}**.

When the court asked Petitioner how he planned on being disruptive, Petitioner said "just verbally . . . [but] not any profanity or anything like that, or disrespectful". Petitioner said he did not want to see any of the witnesses, and rejected the court's suggestion that he be put in the back room where he could turn his back if he desired. Petitioner stated that he wanted to "waive any defense in reference to that proceeding", and wanted to "waive my right to not even be there if I have the right". He was "respectfully" ready to accept the jury's sentence when that time came. **{R. 3516-18}**. Petitioner had no problem with

standby counsel handling the witnesses and objections, and freely and voluntarily waived his right to be present. **{R. 3518-20}**.

The court then discussed with the lawyers whether they had to wait for Petitioner to be disruptive to exclude him, or whether they could just take him at his word that he would be. Standby counsel asserted that Petitioner could waive his right to be present. **{R. 3521-23}**. The court pointed out that Rule 16 of the state rules of criminal procedure seemed to require a capital defendant's presence. **{R. 3523-30}**.

Ultimately, the judge went back to Rule 16, noting the rule required Petitioner to be present. The court ruled that Petitioner would have to sit at the table, although he did not have to look at anyone. The court then directed that the trial proceed, and stated he was going to continue to honor Petitioner's desire to represent himself. **{R. 3532-36}**.

The next morning, Petitioner again stated he still wanted to continue to represent himself. **{R. 3538-42}**. After an opening charge by the judge, the State began its sentencing phase case. As soon as the solicitor asked his first question, Petitioner stood up and recited, "blessed be Yahweh, el Shaddai, Jehovah, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob, and Jesus". The court asked Petitioner to take a seat, which he did, and the solicitor tried to ask the question again. Petitioner stood up a second time and recited the same religious phrase. At this point the court ordered the jury to step out. **{R. 3548-51; 3553}**.

The court reminded Petitioner not to be unruly, but Petitioner stated he intended to continue. The court noted that if Petitioner continued to misbehave, he would be removed from the courtroom and placed in the back room. Petitioner stated he would be noisy back there, too, but the court reminded him that they had "ways to deal with that, too". The court concluded by

saying that Petitioner's presence was required, and that if necessary Petitioner would be "shackled and gagged" so he could not disrupt the proceedings even from the back room. Petitioner indicated his understanding. **{R. 3551-53}**.

When the jury returned, the trial court immediately gave a curative instruction. Again, the solicitor could no more than get out one question when Petitioner stood up and recited the same religious phrase. The court ordered jury out, and put on the record that since Petitioner repeatedly refused to behave, he would be put in the back room where there was a glass partition allowing him to see the proceedings and hear the testimony. Finally, the court warned that gagging would be an option with further outbursts. Again, Petitioner asked to be "exempted" from or to "waive" the proceeding, but the court denied it, stating the rules required his presence. Petitioner was then placed in the back room restrained. **{R. 3555-60}**. However, before the jury returned, the judge ordered restraints to be removed from Petitioner's hands. **{R. 3562}**.

When the jury returned, the trial court gave another curative instruction:

> Again I remind you, please disregard any type of outburst. It has no impact on your consideration of the issues in this case. The fact that the defendant is no longer at the table should have no impact on you in any way whatsoever. He is able to see and hear all of these proceedings.

{R. 3566-67}. The sentencing phase finally began.

After a couple of witnesses testified, a recess was taken. The judge offered to let Petitioner back inside, but Petitioner said he would rather remain in the back. Petitioner promised not to be

disruptive again if the restraints were removed, and the court agreed. Petitioner said he could hear everything, but he would raise his hand if he could not. **{R. 3596-97}**.

After a number of further witnesses, the court again invited Petitioner to return to counsel table. Petitioner again declined, saying he was "fine" in the back, that he could hear and see everything, and that he did not mind standby counsel operating on his behalf in the limited fashion. **{R.3681}**.

The next morning, the trial court asked Petitioner if he would make outbursts in placed in court, and Petitioner said he would. Petitioner again agreed that he preferred to stay in the back room, and that he had no problem with standby counsel representing him. **{R. 3738-40}**.

Finally, at the close of the state's case, the court gave Petitioner one last chance to present a case in mitigation, testify or give a closing statement. Petitioner declined to present a case or testify, but agreed his counsel could argue in closing. **{R. 3760-63}**. Petitioner again stated he would not return to the front of the courtroom without making outbursts. **{R. 3765}**.

During the state's closing argument, Petitioner apparently decided to participate again, by twice interrupting the assistant solicitor to make objections through his counsel. Despite these actions, Petitioner again stated that he preferred to remain in the back. **{R. 3789-90; 3795-97}**.

But after all this, Petitioner ultimately decided to return to the courtroom – where he gave a fairly lengthy closing statement to the jury in which he personally apologized to the victim's families. **{R. 3829-39}**.

Finally, the judge gave yet another curative charge on the issue in his final instruction:

> Now, Ladies and Gentlemen, as I previously instructed, you must not consider any outbursts in the courtroom or throughout the course of these sentencing proceedings.
>
> In addition, the fact that the defendant was not seated at the defense table for part of the proceedings should not be considered by you in any way and specifically no adverse inferences may be drawn from that fact.

{R. 3843}.

D. The South Carolina Supreme Court's resolution of the federal issue on direct appeal

The state supreme court affirmed the sentence, first noting the constitutional right of defendants to represent themselves *pro se*. The court then added that while it may be permissible to exclude a capital defendant from his trial for misbehavior, there was no constitutional right on the part of the defendant to be absent. The court held this was the case regardless of the claimed reason for wanting to absent oneself, and also pointed out that its state rule of criminal procedure specifically required a capital defendant to be present at all times during trial. Finally, the court concluded that there was no prejudice, noting "there is simply no basis to conclude that [Petitioner's] death sentence resulted from his presence in a holding cell at the back of the courtroom". **{A5-A7}**.

ARGUMENT

I. THERE WAS NO REVERSIBLE ERROR FROM THE TRIAL COURT'S REFUSAL TO ALLOW PETITIONER TO COMPLETELY ABSENT HIMSELF FROM SENTENCING, WHERE: (1) HE HAS NO ENFORCEABLE RIGHT *NOT* TO BR PRESENT, (2) THE SIMPLE AND BASIC REQUIREMENT OF PRESENCE IN A CAPITAL CASE IS NOT THE SORT OF RULE THAT CAN VIOLATE ONE'S RIGHT TO PRESENT A DEFENSE, AND (3) ANY ERROR WAS HARMLESS.

A. Petitioner has no constitutionally enforceable right to demand his absence from trial; thus, the trial court could not have committed reversible error in refusing his request.

Petitioner had no constitutional right to demand his absence, and thus certiorari should be denied.

South Carolina's Criminal Procedure Rule 16 contains a clear statement that excludes capital defendants from any sort permissible waiver of the right to be present. The state supreme court pointed this out in its opinion affirming Petitioner's convictions. **{A6 & A6 n.2}**. The only limitation on this state rule is that capital defendants may be excluded when they are disruptive. *State v. Shuler*, 545 S.E.2d 805 (S.C. 2001); *State v. Bell*, 360 S.E.2d 706 (S.C. 1987).

The exclusion of capital defendants in Rule 16 likely has its origin from a view based in dicta from older decisions of this Court that a capital defendant's presence at trial could never be waived. *See Campbell v. Blodgett*, 978 F.2d 1502, 1507-11 (9th Cir. 1992) (extensively discussing the development of the law on

the permissibility of capital waiver of the right to be present). Following this Court's decision in *Illinois v. Allen*, 397 U.S. 337 (1970), that view began to change. As pointed out in *Campbell*, the 1975 amendments to the federal rules of criminal procedure incorporated *Allen* but deleted the similar prohibition on waiver by capital defendants. The notes stated that whether such a waiver was permissible was to be resolved by the courts. *Campbell*, 978 F.2d at 1510-11.

Since that time, it appears a majority of jurisdictions have concluded that the Constitution poses no impediment to a capital defendant voluntarily waiving his right to be present by either request or conduct. *See Campbell, supra. See also L'Abbe v. Dipaolo*, 311 F.3d 93 (1st Cir. 2002) (citing cases and declining habeas relief on a decision to allow waiver); *Smith v. Farley*, 873 F. Supp. 1199 (N.D. Indiana 1994) (citing cases); *People v. Frye*, 959 P.2d 183 (Cal. 1998) (citing cases); *Peede v. State*, 474 So.2d 808 (Fla. 1985); *Commonwealth v. L-Abbe*, 656 N.E.2d 1242 (Mass. 1995); *State v. Morton*, 715 A.2d 228 (N.J. 1998); *Brown v. State*, 871 P.2d 56 (Okla. Crim. App. 1994).

However, simply because it is constitutionally permissible to *allow* a capital defendant to waive his presence does not mean that the defendant has a enforceable constitutional right to demand that his presence be waived. *See Campbell*, 978 F.2d at 1511 ("Although the trial judge need not have granted Campbell's request [to waive his presence], he did not commit constitutional error in doing so."); *People v. Frye*, 959 P.2d at 91 (rejecting an allegation of error that the trial court refused to let the defendant absent himself from the proceedings, and noting that qualifications on the right to be present do not confer an absolute right to be absent from trial). *Cf. generally United States v. Moore*, 466 F.2d 547 (3rd Cir 1972) (criminal procedure rules setting procedure for trial in absentia does not vest right of absence in defendant). While at least one decision has found

(nonprejudicial) error in the failure of the trial court to honor the request not to be present, in that case there was a *state statute* which specifically allowed such a waiver. *See People v. Terry*, 532 N.E.2d 568 (Ill. App. Ct. 1989) (finding no prejudice from judge's denial of request not to be present where the best the defendant could come up with was that the eyewitnesses would have an easier time).

In contrast, South Carolina has a court rule with plain language that expressly precludes such a waiver. While this Court has never specifically resolved whether a capital defendant can waive his presence, *see Campbell*, 344 F.3d at 1323 – or whether a state can require presence of a capital defendant over his objection, there exists no significant conflict of decisions on the issue that makes certiorari warranted. The fact of the matter is that Petitioner had no enforceable constitutional right to demand absence, and thus the state rule controls.

B. Not only is Petitioner's claim of interference with strategy not preserved, but it provides an insufficient basis for constitutionally mandating that a defendant can refuse to be present.

In his petition before this Court, Petitioner asserts he is NOT raising a "right not to be present", but instead asserting that the state rule interfered with his Sixth Amendment right to present a defense. He argues that exiting the courtroom was how he was choosing to mute the state's presentation of victim impact evidence.

This issue is not preserved. While he made some brief mention of strategy in his brief before the state supreme court, Petitioner *did* in fact argue before that court on the existence of a right "not to be present" **{Final Brief of Appellant pp. 10-11}**,

and that is the only basis on which the state court ruled. **{A5-A7}**. Similarly, Petitioner at trial never once made the argument that he strategically wanted to ~~avoid the~~ victim impact witnesses to mute their aggravating effect – Petitioner only stated that since a life sentence was death to him also, if the jury convicted him he wanted no further part of the process – as it made no difference which sentence he received. He even went so far as to say that *either* sentence would be acceptable to him, and that what the jury did in the sentencing phase had no "relevance" to him. **{R. 3455-58; 3486-87}**. Since Petitioner never made the Sixth Amendment "interference with a defense" argument either at trial or on appeal, and since the trial court or state supreme court never ruled on such an argument, then the issue is not preserved for review by this Court. *See Bailey v. Anderson*, 326 U.S. 203 (1945) (state appellate court must actually consider point not raised to trial court in order for United States Supreme Court to have jurisdiction).[1]

Regardless, Petitioner's contention is without merit and unworthy of certiorari. This Court has noted that the Sixth Amendment could be violated by governmental action which interferes with counsel's ability to make independent decisions as to how to conduct the defense, *see Strickland v. Washington*, 466 U.S. 668 (1984), and has also reversed cases where there was direct state interference with counsel's decision making process. *See Geders v. United States*, 425 U.S. 80 (1976) (refusal to allow attorney and defendant/witness to confer overnight); *Herring v. New York*, 422 U.S. 853 (1975) (refusal to allow defense summation at bench trial); *Ferguson v. Georgia*, 365 U.S. 570 (1961) (direct examination of the defendant). In these cases, this Court found either no justification for the state rule or an interest

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[1] *State v. Sullivan*, 282 S.E.2d 838 (S.C. 1981) (issue not argued in the brief cannot be considered on appeal); *State v. Thomas*, 156 S.E.2d 169 (S.C. 1930) (issue not ruled upon by the trial judge is not preserved for appeal).

that could have been achieved through less prejudicial means. *See Lance v. Young*, 869 F.2d 1008, 1012-13 (7th Cir. 1989) (setting forth the above discussion).

Here, though, there was merely an indirect effect on strategy from an otherwise neutral requirement that a person be present for his capital trial – and indirect effects have been rejected as sufficient to establish a Sixth Amendment violation. *See Young*, 869 F.2d at 1013-14 (prosecution calling of defense psychiatrist). Indeed, it is hard to see an analogy between application of specific evidentiary or procedural rulings to preclude a specific examination, argument, or consultation – and the basic and simple requirement that a person actually be in the courtroom when faced with a death sentence.

Here, given the severity of the possible penalty, there is undoubtedly a legitimate State interest in having a capital defendant present for a trial – not only to ensure a properly functioning adversary system, and to ensure a defendant knows precisely why his life was forfeit, but also to ensure public confidence in a transparent system in which a man cannot be sentenced to death without being present, in the courtroom, with the opportunity to defend himself and object to errors if and when he so chose. Billings v. Polk, 441 F.3d 238 (4th Cir. 2006) (submission over defense objection of a mitigating factor was not Sixth Amendment error, as State had interest in seeing that all mitigating evidence goes to the jury in a capital case). Indeed, as noted before, the prevailing view of this Court used to be that a capital defendant had to be present at all stages of his trial – due to these very concerns. See Lewis v. United States, 146 U.S. 370 (1892).

Not only did Petitioner not actually express the strategy his appellate counsel now claim, but there was no constitutionally impermissible interference with it even if he did.

C. Any error was harmless.

Finally, the state supreme court was correct that any error in requiring Petitioner's presence was harmless. First, of course, we have overwhelming evidence that Petitioner committed *two* extremely aggravating capital crimes.

Second, Petitioner had a history of violent crimes and drug crimes, which resulted in three stays in prison during which he was a known troublemaker. Petitioner is about as unadaptable to prison as they come. There was even photographic evidence of visible injuries Petitioner inflicted on an eleven-year old girl.

Third, Petitioner refused to present any mitigation case whatsoever.

Therefore, we have overwhelming evidence of guilt, two brutal capital murders of law enforcement officers, an extremely strong case in aggravation in which Petitioner is shown to be a future danger and unadaptable to prison, and no mitigation case. Against this, the Court must consider two things to determine prejudice in sentencing – Petitioner's misbehavior, and the fact that he was kept in the back room for the sentencing phase.

With regard to his outbursts and the subsequent "punishment", one thing is clear – he had no *right* to misbehave and disrupt the courtroom. Even if the judge made a legal error in refusing to let him leave, Petitioner's permissible response is to complain on appeal – not obstruct the courtroom. As such, the fact of Petitioner's outburst is really chargeable *against* him in the prejudice analysis as another reason why his later placement in the back room would not have had such an effect on the jury as to create an unfair sentencing hearing. *See generally, e.g. State v. Logan,* 306 S.E.2d 622 (S.C. 1983) (defendant cannot complain of an error that results from his own conduct, or to which his

conduct has contributed). In any event, the outbursts only involved standing and loudly reciting a religious phrase.

Regardless of Petitioner's fault, the judge's resolution of the problem did not result in undue prejudice. This room was not a "holding cell" but rather some sort of hearing room, as it is described by the court reporter. **{R. 3448 line 3; 3551 lines 5-15}**. Petitioner was only restrained at his feet for part of the time; there is no evidence the jury could see that, and all restraints were eventually removed after Petitioner stated he would behave and he preferred to stay in the back room. **{R. 3562; 3596-97}**.

Further, Petitioner ultimately returned to the courtroom unrestrained to give a closing argument, thus muting any inference that he was too dangerous to be trusted, which was unlikely anyway in a case that Petitioner had reasonably litigated before the jury for over two weeks. Finally, the judge repeatedly gave the jury a curative instruction that its decision was not to be affected by Petitioner's placement in the back room.

Considering the egregious facts of this case, it simply cannot be said the decision was swung in favor of death because Petitioner spent part of the short sentencing hearing visible in a hearing room.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should decline to grant the writ of certiorari.

Respectfully submitted,

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